SA JAMIL MD YUSOF

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CRIMINAL APPEAL NO: 41-3-2001(1)]
1 MARCH 2002

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Two separate trials - Whether sentences of imprisonment could be made to run consecutively against one and the other - Subordinate Courts Act 1948, s. 102*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Several offences at one trial - Whether distinct offences - Whether sentences should run consecutively or concurrently - Subordinate Courts Act 1948, s. 102*

This was an appeal by the appellant (who was sentenced in two separate proceedings under s. 420 of the Penal Code by the learned magistrate) against the learned magistrate's order that the terms of imprisonment for all three offences in the second proceeding run consecutively of one another, and consecutive to that of the imprisonment term ordered in the first trial. The two issues that required determination were: (1) whether sentences of imprisonment in two separate trials could be made to run consecutively against one and the other; and (2) whether the offences in this appeal were of the same nature and transaction so as to have warranted a concurrent rather than consecutive term of imprisonment.

Held:

[1] In view of the clear wording of s. 102 of the Subordinate Courts Act 1948 ('the Act'), it was clear that the learned magistrate was in error as he had no power to make an order to the effect that the three sentences in the instant appeal run consecutively to that of the term of imprisonment ordered in the first proceeding; where there are two separate proceedings s. 102 has no application for the magistrate to order a consecutive sentence. (p 135 e)

[2] Under s. 102 of the Act, a magistrate has the power to order terms of imprisonment to run consecutively where two or more offences are tried together in one trial. However, this power is only exercisable upon a finding at the first instance that the offences for which the accused is tried are distinct from one another. On the facts of this case, the continuity of action and purpose by the appellant in all three offences could not in the

circumstances support the learned magistrate's finding that the offences for which the appellant were convicted and sentenced were distinct. Therefore, the provisions of s. 102 of the Act were not applicable and there was no discretion to order the terms of imprisonment to run consecutively. (pp 135 f-g & 140 c)

[Appeal allowed; consecutive sentence imposed with the first proceeding set aside and sentence for the three offences (enhanced to four years for each of the three offences with three strokes of rotan) in second proceeding to run concurrently.]

Case(s) referred to:
Amrita Lal Hazra & Ors v. Emperor ILR 42 Cal 957 ***(refd)***
Emperor v. Ganesh Narayanan [1912] Cri LJ 833 ***(refd)***
Emperor v. Ghulam wd Sarang & Ors [1908] Cr LJ 191 ***(refd)***
Emperor v. Hari Raot [1906] Cr 420 ***(refd)***
Haji Johari Hj Abd Karim v. PP [1989] 1 CLJ 1013; [1989] 2 CLJ (Rep) 705 ***(not foll)***
Jones v. Curling [1884] 13 QBD 262 ***(refd)***
Lim Tian Chye v. PP FMSLR 228 ***(foll)***
Nga Tha Gyi v. Emperor [1912] Cr LJ 485 ***(refd)***
PP v. Loh Ang Sing [1965] 2 MLJ 129 ***(foll)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 ***(dist)***
Veerasingham v. PP [1958] 24 MLJ 76 ***(foll)***

Legislation referred to:
Penal Code, s. 420
Subordinate Courts Act 1948, s. 102

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the prosecution - En Iskandar DPP

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy JC:
The appellant herein appeals against sentence meted out by the magistrate on 17 January 2001. From the appeal record there were two proceedings before the Kota Tinggi magistrate. In the first, under Kes Tangkap No. 83-248-2000 he was charged for one offence under s. 420 of the Penal Code. He pleaded guilty and was sentenced to two years imprisonment, and three strokes of the rotan. There is no appeal against that order.

In the second proceeding, he was charged for three offences under Kes Tangkap No. 83-64-2000, 83-65-2000 and 83-66-2000 all under s. 420 of the Penal Code. The prosecution made an application for a joint trial for all three offences. The magistrate accordingly so ordered, and the accused claimed trial.

After the trial had commenced, the accused changed his plea to one of guilty. The learned magistrate in accepting his plea convicted him in respect of all three offences and sentenced him to a period of imprisonment for two years and three strokes of the rotan for each offence. He then ordered that the terms of imprisonment for all three of the offences run consecutively of one another and consecutive to that of the imprisonment term ordered in the first trial.

The appeal herein is against the order of the learned magistrate in the second proceeding.

Learned counsel for the appellant Encik Gobind Singh Deo raised two issues for the determination of this Honourable Court. They are:

1. Whether sentences of imprisonment in two separate trials can be made to run consecutively against one and the other.

2. Whether the offences in this appeal were of the same nature and transaction so as to have warranted a concurrent rather than consecutive term of imprisonment.

Turning to the first issue the empowering provision regulating the powers of the Magistrate Court in meting out sentences over conviction of several offences at one trial is s. 102 of the Subordinate Courts Act 1948:

Section 102 provides as follows:

> Sentence in case of conviction for several offences at one trial
>
> When a person is convicted at one trial of any two or more distinct offences a Magistrates' Court may sentence him for those offences to the several punishments prescribed therefore which the court is competent to inflict, the punishments when consisting of imprisonment to commence the one after the expiration of the other in such orders as the court may direct, or to run concurrently if the court shall so direct, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender for trial before a higher court:
>
> Provided that:
>
> a) in no case shall the person be sentenced to periods of imprisonment amounting in the aggregate to more than twenty years;
>
> b) the aggregate punishment shall not exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict; and

c) when imprisonment is directed in default of payment of a fine or of costs or compensation ordered under the authority of any law for the time being in force, the imprisonment shall be consecutive to any other term or terms of imprisonment so directed and to any sentence of imprisonment otherwise imposed.

From the wording of s. 102 the power conferred on the magistrate to order a consecutive sentence must be predicated by a conviction at one trial for two or more distinct offences. Thus a magistrate is not empowered to order sentences in two separate trials to run consecutively of one another.

In this connection it is appropriate to address the submission by the prosecution that since the sentence in Kes Tangkap No. 83-248-2000 was not the subject matter of the appeal herein the court cannot make any pronouncement over it. Though it is true that the sentence in No. 83-248-2000 was not subject of any appeal nevertheless there is uncontroverted evidence in the appeal record that the learned magistrate in meting out the sentences in the other three offences expressly specified that it was to run consecutively with it, which sentence clearly takes it out of the ambit of s. 102 and is a manifest error on the face of the record where the dictates of justice warrants this court to put right.

In view of the clear wording of s. 102 it becomes abundantly clear that the learned magistrate was in error as he had no power to make an order to the effect that the three sentences in the instant appeal run consecutively to that of the term of imprisonment ordered in the first proceeding in Kes Tangkap No. 83-248-2000. In a situation here where there are two separate proceedings s. 102 has no application for the magistrate to order a consecutive sentence.

Coming to the second issue under s. 102 of the Subordinate Courts Act 1948, a magistrate has the power to order terms of imprisonment to run consecutively where two or more offences are tried together in one trial. However it is clear that this power is only exercisable upon a finding at the first instance that the offences for which the accused is tried are distinct from one another. The crucial words under s. 102 are "convicted at one trial of any two or more distinct offences".

What amounts to "distinct" offences was established by the Indian case of *Amrita Lal Hazra & Others v. Emperor* ILR 42 Cal. 957 where it was held that there are four main tests which help in the legal determination as to what amounts to "the same transaction." They are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. It is interesting to note that in establishing the four main tests the Indian court also made the following observation:

> A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "same transaction"; **the circumstances which must bear on its determination** in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. (emphasis added)

Based on the observation aforesaid learned counsel for the appellant strenuously argued that the said four tests are not cumulative but instead mutually exclusive.

It is the appellant counsel's contention that it was never the pronouncement in *Amrita Lal Hazra*'s case that a magistrate or judge should satisfy himself as to the existence of all four tests together before finding that two offences are of the same transaction and that such an approach adopted by the magistrate is wrong in law.

Learned counsel's contention is principally based upon an evaluation of the several cases cited in *Amrita Lal Hazra*'s case which would suggest that the four tests therein enunciated are merely examples of instances from which it can be deduced whether any two offences are of the same transaction or not.

The four cases referred to in *Amrita Lal Hazra*'s case are *Nga Tha Gyi v. Emperor* [1912] Cr LJ 485 where it was held:

> Proximity of time between acts does not necessarily constitute such acts parts of the same transaction.

In *Emperor v. Ganesh Narayanan* [1912] Cri LJ 833 it was held:

> the accusation against all the accused was that they carried out a single scheme by successive acts done at intervals, but there was complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of section 239.

In *Emperor v. Hari Raot* [1906] Cr 420 it was held:

> The word "transaction" is not defined in the Code. Etymologically it means "carrying through" and according to Batty, J, in *Emperor v Dattor Hanmat Shahapurkar* (3) suggests not necessarily proximity in time so much as continuity of action and purpose. The importance of proximity in time was dwelt on in *Queen-Empress v. Fakirappa* (4) and in distinct intervals of time it will often be impossible to describe them as part of the same transaction: see the case cited at pages 406-411, Volume III of *Russel on Crimes and Misdemeanors* (6th Edition). But that offences need not be committed on the same occasion appears clearly from illustration (c) and (f) to sub-section (1) of section 235, in each of which the acts mentioned, though separated by a distinct interval of time, are closely connected by continuity of purpose or progressive action towards a single object.

And lastly in *Emperor v. Ghulam wd. Sarang and others* [1908] Cr LJ 191 it was held:

> The expression "same transaction" used in sections 235 and 239 has not been defined in the Code, but the illustrations to the sections make the intention of the legislature, sufficiently clear. If a series of acts or so connected together by proximity of time, community of criminal intent, continuity of action and purpose, or by the relations of cause and effect, the accused may be charged with, and tried at one trial for every offence committed in such series of acts. If more persons than one are accused of different offences, committed in series of acts so connected, they may be tried together.

Flowing from the principles deduced from the four cases referred to above by *Amrita Lal Harar*'s case it is urged that this court ought to recognise that the four tests in *Amrita*'s case are mere individual circumstances which bear on the determination of the question in each individual case.

Upon a close scrutiny of *Amrita Lal Hazra*'s case and the four cases cited therein there appears to be some fluidity in the application of the four tests. There is no fixed rule as to the test in determining what makes offences distinct from one another which in turn would invariably point to the conclusion that the four tests in *Amrita* are mutually exclusive and not cumulative.

Hence by reason thereof it is not obligatory for a magistrate or judge to find that all the four tests as set out in *Amrita Lal Hazra* be satisfied to conclude that two offences are of the same transaction or otherwise. The existence of one or the other could well be material enough to support a finding, in the circumstances of the case that the offences are 'distinct'.

The conclusion aforesaid is amply supported by two local cases. In the case of *Lim Tian Chye v. Public Prosecutor* FMSLR 228 it was held, per Innes JC:

> It seems to me that the series of acts enquired into though separated by short intervals of time, may well be held to have formed one transaction in the sense that they were connected through being done with one specific criminal intent for the furtherance of a continuous plot. Indeed the acts charged as cheating and criminal breach of trust had to be carried out before the employment of the forged delivery orders could be effectually resorted to.

And in *Public Prosecutor v. Loh Ang Sing* [1965] 2 MLJ 129 it was held:

> The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However it is not necessary that all of them should be present to make the several incidents parts of the same transaction. The

> main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction … . Where the case for the prosecution is that all the accused persons carried out a single scheme by successive acts at different intervals and there was unity of purpose and the whole series of acts were linked together by one motive and design so as to constitute one transaction then a joint trial is not only valid but is also proper in the interest of public expense, time and convenience.

By reason of the mutual exclusivity of the four tests it follows that the existence of any one or more of them is sufficient to justify a finding that the offences are of the same transaction. The determination invariably would be dependent on the facts of each case. In point of fact the decision in *Lim Tian Chye* and *Loh Ang Sing* would seem to suggest that the main test applicable is unity of purpose and design which is linked to motive.

The learned deputy Public Prosecutor has urged me to adopt the decision of the Brunei High Court in *Haji Johari bin Haji Abd. Karim v. Public Prosecutor* [1989] 1 CLJ 1013; [1989] 2 CLJ (Rep) 705 where it was held that the period of time of three weeks which separated the offence and involving separate victims made the offences separate and distinct.

I declined to follow the Brunei authority as at most it is only persuasive and not binding on me and from the evidence appearing in the appeal record herein though the four offences were committed over a period of six months on separate victims and at different times nevertheless the facts clearly show the accused had devised a scheme to cheat people. He used a similar story to induce his three different victims and he succeeded. The *modus operandi* was certainly reflective of the same criminal intent, which was 'to cheat' using the same story, for money.

Clearly therefore the offences were of the same nature and transaction and hence not distinct from one another.

The learned magistrate in his grounds of decision fell in error by approaching the tests in *Amrita Lal* in the wrong way. He held that although the places of offences were the same, but because the victims were different and times were different, the sentence was better made consecutive and not concurrent – (see p. 31 Appeal Record). Such an approach is clearly wrong in law more so in the light of the rather peculiar and striking feature of the same police report being tendered for each of the three offences which amply evidences continuity of action and purpose in all three offences.

From the appeal record it would appear that the learned magistrate was strongly influenced by the following passage in *PP v. Yap Huat Heng* [1986] 1 CLJ 81; ([1986] CLJ (Rep) 645) where Shaik Daud J (as his Lordship then was) stated at p. 85 (p. 648):

> where two or more distinct offences have been committed, sentences of imprisonment should not be made concurrent. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively; ... .

A close scrutiny of the facts in *Yap Huat Seng*'s case would reveal that the appellant was convicted of two offences ie, of robbing and rape. The appellants had robbed their two victims. Not being satisfied, they proceeded to take turns to rape the two victims. One of the victims was only 13 at the time. There was also evidence that the accused had passed on an infectious disease to one of his victims.

From the facts it is abundantly clear that the offences were distinct from one another. They robbed and raped later. The offences were heinous to say the least, and the sentence of consecutive imprisonment was therefore justified.

The learned magistrate in his case was swayed by the proposition in *Yap Huat Seng*'s case that sentences should only be made to run concurrently where the offences are principal and subsidiary. Unfortunately the learned judge did not elaborate the circumstances when an offence can be categorised as principal and subsidiary.

Before determining the propriety of the proposition it is appropriate to make reference to a passage in *Jones v. Curling* [1884] 13 QBD 262 which is cited in *Veerasingham v. PP* [1958] 24 MLJ 76, wherein Bowen J held:

> I have always entertained the strongest opinion that the Court would be acting *ultra vires* if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms. In laying down any such general rule as was pointed out by Brett, M.R., in the case of *The Friedeberg* (4), a Judge is trying to fetter his own discretion and that of his successors which he has no legal power to do.

From the passage aforesaid and applying it in the context of s. 102 of the Subordinate Courts Act it is my finding that under s. 102 of the Subordinate Courts Act 1948 a magistrate has an unfettered discretion in considering whether or not sentences of imprisonment in two or more offences tried in a trial ought to be concurrent or consecutive. The proposition in *Yap Huat Seng* that it is only in instances where the offences are principal and subsidiary in nature that sentences ought to run concurrently cannot, therefore be of binding

application as that would tantamount to the laying down of a hard and fast line upon which discretion ought to be exercised in a situation where a statute provides a judge with otherwise unfettered discretion. Of course, a judge may look to it for guidance but the decision in *Yap Huat Seng*'s case cannot be a binding proposition and hence ought to be confined to the facts of its case.

To recap the position the learned magistrate clearly was in error in ordering the consecutive sentences of imprisonment for the first and second proceedings as they were two separate trials and hence not within the scope of s. 102.

The continuity of action and purpose by the appellant in all three offences cannot in the circumstances support the learned magistrate's finding that the offences for which the appellant were convicted and sentenced were distinct. Where the offences are not distinct, the provisions of s. 102 are not attracted and there is no discretion to order the terms of imprisonment to run consecutively.

By reason of the serious misdirection by the learned magistrate on a matter of law namely in respect of the construction of s. 102 of the Subordinate Courts Act 1948 the interest of justice dictates that I have to right the wrong and hence I accordingly allow the appeal and set aside the consecutive sentence imposed with the first proceeding and that the sentence imposed on the appellant for the three offences in the second proceeding in Kes Tangkap 83-64-2000, 83-65-2000 and 83-66-2000 are to run concurrently. However in view of the nature of the offence committed being committed in a pattern and the appellant having a history of cheating and/or involved in offences with an element of cheating an increase in the sentence is warranted and I am of the view that an enhanced sentence of four years for each of the three offences with three strokes of the rotan, the sentences to run concurrently from date of arrest is appropriate and I so order.